IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 319.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT; THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Statement and Brief for the Appellees on Motion to Dismiss or Affirm and on the Merits.

STATEMENT.

This is an injunction suit by the appellant, The Illinois Central Railroad Company, against The Mississippi Railroad Commission and State Railroad Assessors and their Clerk, and the State Revenue Agent, and The Yazoo and Mississippi Valley Railroad Company, in the circuit court of the

United States for the southern district of Mississippi, to prevent the approval and certification of an assessment, and to prevent a suit for taxes by said revenue agent on what was formerly the property of the Natchez, Jackson and Columbus Railroad Company, purchased by the Louisville, New Orleans and Texas Railway Company in 1890, and now belonging to said Yazoo and Mississippi Valley Railroad Company by virtue of a consolidation between said Louisville, New Orleans and Texas Railway Company and the original Yazoo and Mississippi Valley Railroad Company, under the name of the present Yazoo and Mississippi Valley Railroad Company, on October 24, 1892.

The taxes in controversy are back taxes from 1886 to 1891, inclusive, which the revenue agent sought to have said railroad commission to assess and which they did assess on August 1, 1898, after notice to said Yazoo and Mississippi Valley Railroad Company, and its answer and objections heard and overruled, and the assessments were ordered to remain on file for thirty days for the filing of any objections thereto.

Record, p. 95.

On August 4, 1898, this bill was filed and a temporary restraining order made, and on August 5, 1898, the temporary restraining writ was issued and served.

Record, pp. 34, 35.

The matter was continued along by consent until in January, 1899, the revenue agent and railroad commission and their clerk made a motion to discharge the restraining order, and the plaintiff a counter-motion for an injunction.

Record, pp. 89, 90.

The motion to discharge the restraining order and refuse the injunction was as follows:

"1st. They have no authority to distrain or levy on or sell anything for said taxes, and were, and are merely per-

forming the duties enjoined upon them by and under the laws of Mississippi, and an injunction against them or any of them is a suit against the State of Mississippi and forbidden by the 11th amendment to the Constitution of the United States.

"2nd. Said railroad commission, in making said assessments act judicially and cannot be enjoined, and said revenue agent cannot act until after said assessments are made, approved, and the rolls sent to the various counties as required by the laws of Mississippi.

"3rd. Said injunction was prematurely applied for.

"4th. Plaintiff has shown no right to file the bill in this case under the 94th equity rule or otherwise.

"5th. This court has no jurisdiction.

"6th. The plaintiff is not entitled to an injunction on the facts shown in the bill.

"7th. There is no equity on the face of the bill."

Record, p. 89.

On February 7 the court discharged the restraining order and refused the injunction in the following order:

"This cause came on to be heard on the motion of the defendants, except The Y. & M. V. R. R. Co., to discharge the restraining order heretofore granted, and to refuse the injunction, and on the motion of the complainant to grant an injunction as prayed for in the bill, and both motions were heard together by consent, notice on both sides being waived, and the court after hearing the pleadings, exhibits and evidence pro and con and arguments of counsel on both sides, after due consideration finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction, it is therefore considered and so ordered, adjudged and decreed, that the motion to discharge the said restraining order is sustained and said restraining order discharged and the injunction refused. It is further ordered that said motion to grant an injunction is overruled, and the injunction refused."

Record, p. 128.

An appeal was prayed and allowed from this interlocutory order on February 9, 1899, to the United States circuit court of appeals for the fifth circuit, at New Orleans, and said court, on April 25, 1900, dismissed the same, *ex moro motu*, for want of jurisdiction.

Record, pp. 130, 133.

Then, on May 1, 1899, which was the first Monday of May and the first day of the next term of the circuit court, the said defendants, appellees here, made a motion to dismiss the bill on the ground that "the sole object of the bill was for an injunction, as shown therein, which injunction was refused by this court, and from the decree refusing said injunction an appeal was prayed to the United States circuit court of appeals for the fifth circuit; which appeal was by said court of appeals dismissed for want of jurisdiction, as appears from the copy of the opinion of said court, now here shown to the court."

Record, p. 133.

This motion was sustained and the bill dismissed, and the plaintiff prayed and obtained an appeal to this court.

The petition for appeal is under "section 5 of the act of Congress of the United States approved March 3, 1891," and prays an appeal "from the final decree refusing jurisdiction of the cause."

Record, pp. 133, 134.

The order granting the appeal specifies that "this appeal is granted solely on the question of jurisdiction, this court having refused to assume jurisdiction in this cause."

Record, p. 135.

And the assignment of errors is that "the court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same."

Record, p. 134.

The certificate of the judge was under the fifth section of the judiciary act of March 3, 1891, reciting the substantial contentions of the bill, the issuance of the restraining order; that one of the grounds of the motion to discharge the same was "that the court had no jurisdiction to issue the same or to entertain the cause;" that said motion was sustained, the restraining order discharged, and injunction refused, and that on May 1, 1899, on motion of said defendants, a final order was entered dismissing the bill (Record, pp. 136–140), and the judge certifies that in said cause the jurisdiction of the court was in issue upon said grounds, namely:

"1st. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that complainant's interest was derivative through said Yazoo and Mississippi Valley Railroad Company, and that the complainant had no right to raise jurisdiction in the Federal courts by making said Yazoo and Mississippi Valley Railroad Company a party defendant in the cause.

"2d. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no Federal question.

"3d. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment of the Constitution of the United States."

Record, p. 140.

The substance of the bill, so far as it is material to the three certified questions, is as follows:

1st. In relation to the first certified question, that no jurisdiction is shown by reason of diversity of citizenship, the bill shows that the Mississippi Valley Company was incorporated in 1872, and that in 1876 the said Illinois Central Railroad Company acquired all but four shares of its stock, and that in April, 1892, the said Mississippi Valley Company purchased 37,539 of the 48,242 shares of the capital stock, and that said Illinois Central Railroad Company

at the same time purchased $13,805,000 of the $16,900,000 first-mortgage, $8,731,000 of the $10,000,000 second-mortgage, and $8,347,000 of the $10,000,000 income or land-grant bonds of said Louisville, New Orleans and Texas Railway Company, all of which were paid for with $20,000,000 out of a $25,000,000 issue of 4 per cent. mortgage bonds of said Illinois Central Railroad Company, using the Louisville, New Orleans and Texas Railway bonds as collateral to said Illinois Central issue.

Paragraphs 12 and 13, Record, pp. 17–19.

It then recites the purchase of the said Natchez, Jackson and Columbus railroad in March, 1890, by the said Louisville, New Orleans and Texas Railway Company under the act of February 19, 1890 (Laws of 1890, p. 675), and the consolidation, on October 24, 1892, between the said Louisville, New Orleans and Texas Railway Company and the original Yazoo and Mississippi Valley Railroad Company, by which the present Yazoo and Mississippi Valley Railroad Company was formed.

Paragraphs 9 and 15, Record, pp. 12 and 20.

The charter of said Mississippi Valley Company, showing that its capital stock was one thousand shares, and the said deed of consolidation are made parts of the bill and appear in the Record at page 99, section 5.

On the hearing of the motions to discharge the restraining order and for an injunction, the judge's minutes show that the charter of this Mississippi Valley Company was introduced in evidence, and also the opinion of the State supreme court of November 22, 1898, in the case styled Wirt Adams, State revenue agent, appellant, *vs.* The Yazoo and Miss. Valley R. R. Co. *et al.*, appellees, and this is also shown by the agreement of counsel as to the court of appeals record.

Record, pp. 90, 91.

This opinion is not copied in this record, but is in the record in the case referred to, now pending in this court on a writ of error to said State court, under the style and number of the October term, 1899, of this court, No. 244, The Yazoo & Mississippi Valley Railroad Co. *et al. vs.* Wirt Adams, State revenue agent, and in that opinion, in that record, on page 647, it is shown that at the time of the consolidation, on October 24, 1892, there were 6,000 shares of stock of the original Yazoo and Mississippi Valley Railroad Company and 50,000 shares of the stock of the said Louisville, New Orleans and Texas Railway Company, showing that the 37,592 shares owned by the Mississippi Valley Company was a majority of the whole.

The bill also shows that the aggregate amount of taxes would be more than $50,000, but leaves the amounts due the State and each county and town $——.

Paragraph 16, Record, pp. 21, 22.

NOTE.—We do not refer to this as a technical defect alone that might be remedied by amendment, but to call the attention of the court to the fact that until the assessment was completed and approved, it was impossible to specify what the taxes would be, and that hence the plaintiff had shown no right to invoke the jurisdiction of the court.

2d. As to the third certified question, that it is a suit against the State, the bill prays for an injunction to enjoin the State railroad commission or assessors from approving and them and their clerk from certifying or sending the assessment-rolls to the various counties and towns in which the railroad is located, and to enjoin the State revenue agent from "beginning, by himself, his attorneys, solicitors or agents, or advising or inciting any of the counties and towns to begin any suit for the recovery of any judgment, or decree for said taxes, or for the enforcement of the alleged lien for taxes for any of the years mentioned in this bill, and from any proceeding looking to the subjection of the prop-

erty, * * * and that on the final hearing of this cause said injunction may be made perpetual, * * * and that the contract of exemption, as shown by the charter of the said Natchez and Jackson Railroad Company, and said section twenty-one of said Mobile and Northwestern charter as applied thereto by the act of 1870, be declared valid and binding, *both as to the State* and counties and municipalities therein *for the term of thirty years from the date of said charter.*" The italics are ours.

Record, pp. 33, 34.

3d. As to the second certified point—that no Federal question is raised by the bill—the bill is extremely long, critical, historical, and argumentative, but, stated as succinctly as possible, the following is its gist or gravamen:

1st. That by the act of August 8, 1870, the legislature conferred on said Natchez, Jackson and Columbus Railroad Company the benefits of the twenty-first section of the charter of the Mobile and Northwestern Railroad Company, which was as follows:

"SECTION 21. *Be it further enacted*, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value, which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said company, (and which agreement is irrepealable,) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which said company may have incurred in the construction of said road, or money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax

collector in each and every year to give to said company a receipt in full for the amount of said taxes, upon receiving from said company an affidavit, made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt, so given, shall be in full of all taxes, State, county and municipal, to which said company shall be subject: *Provided, however*, That whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

Paragraph 4, Record, pp. 5, 6.

2d. The purchase of said Natchez, Jackson and Columbus railroad, "with all its immunities," by the said Louisville, New Orleans and Texas Railway Company in March, 1890, under the act of February 19, 1890. This act is recited in the bill, paragraph 9, Record, pp. 12–14.

3d. The consolidation of October 24, 1892, between the said Louisville, New Orleans and Texas Railway Company and the original Yazoo and Mississippi Valley Railroad Company, by which the present Yazoo and Mississippi Valley Railroad Company was formed.

Paragraph 14 and deed of consolidation, Record, pp. 19, 20, 43–46.

4th. It then recites the following provisions of the State constitution of December 1, 1869:

"ARTICLE XII.

"SECTION 13. The property of all corporations for pecuniary profits, shall be subject to taxation, the same as that of individuals.

"SECTION 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."
Paragraph 4, Record, p. 5.

5th. It then recites what is known as the "factory act" of April 1, 1872, which is substantially the same as said section 21, except in four particulars, viz:

(*a.*) The said factory act is made to apply to "any and all manufacturing companies in this State whose capital stock shall not be less than ten thousand dollars paid in, not in operation before the passage of this act."

(*b.*) The part in brackets in said section 21, "and which agreement is irrepealable," is omitted in said factory act.

(*c.*) Only an annual dividend of 4 per cent. was allowed instead of the 8 per cent. in said section 21.

(*d.*) The factory act only exempts for ten years.
Record, pp. 7–8.

On April 17, 1873, the Mississippi mills having been burned down, in order to induce it to rebuild and prevent any doubt as to whether the act of April 1, 1872, would extend to its new factory, an act was passed expressly making the provisions of said act of 1872 applicable to it.
Mississippi Mills *vs.* Cook, 56 Miss., 43.

6th. The bill then goes on to show that in the year 1877 the legislature passed an amendatory act which provided that the said act of April 1, 1872, should not exempt from taxation "any property of any manufacturing company or manufactory, other than the paid-in capital stock of said companies, their machinery for manufacturing purposes, their manufactured goods and the buildings in which their machinery is located, and the grounds upon which their build-

ings are situated, or which may be within the necessary inclosure around such buildings," and that the said Mississippi Mills filed its bill to prevent Cook, the tax collector, from collecting taxes on its outlying lands, under this last act, on the ground that it impaired the obligation of the contract with it, and that on the trial of said case the supreme court of the State decided that the words "shall be subject to" in the constitution did not mean subjected to, but that said "provision is mandatory, not that the property of corporations shall be taxed (that is, left to the legislature), but such property shall ever be subject to—*i. e.*, liable to—be taxed if the legislature so wills;" that this decision was made in April, 1878, and had been followed and reaffirmed in many cases, and had been adopted and acted on by the legislature, and by the executive and judicial departments of the State, and by the officers and agents of the State, and had become a settled rule of property, and that enormous sums have been invested in the State on the faith of it.

Paragraph 4, Record, pp. 3–9.

7th. That while the charter of said Natchez, Jackson and Columbus Railroad Company was granted on July 21, 1870, and a part of the work done, yet the road was not completed till after said decision, and in reliance on it; that it was purchased by the Louisville, New Orleans and Texas Railway Company in 1890 under authority conferred by said act of February 19, 1890, and in reliance on said Mississippi Mills case and said constructions, and the further fact that the legislature had in 1886 and 1888 refused to repeal said twenty-first section.

Paragraphs 7, 9, and 10, Record, pp. 10, 12–16.

8th. It then claims that the exemption was recognized and preserved in that part of section 181 of the constitution of 1890 which says "exemptions from taxation to which corporations are legally entitled at the adoption of this con-

stitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature," and by section 279, which provides that "all rights, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the State, and charters of incorporation, shall continue," &c.

Paragraph 11, Record, pp. 16, 17.

9th. It then relates that in April, 1892, the Mississippi Valley Company, of whose stock the said Illinois Central Railroad Company owned all but four shares, purchased 37,539 of the 48,242 shares of the capital stock of said Louisville, New Orleans and Texas Railway Company, and the said Illinois Central Railroad Company purchased $13,805,000 of the $16,900,000 of its first-mortgage, $8,731,000 of the $10,000,000 of its second-mortgage, and $8,347,000 of the $10,000,000 of its income or land-grant bonds; all of which the said Illinois Central Railroad Company paid for, both bonds and stock, with $20,000,000 of its own 4 per cent. gold bonds and issued an additional amount for purposes of betterments, so as to make the total issue $25,000,000, relying on said adjudications and legislation aforesaid, and that said Illinois Central Railroad Company, by a certain trust deed of September 1, 1892, placed all said bonds "*purchased by it, as aforesaid*," including the collateral bonds, $1,250,000 of the Natchez, Jackson and Columbus Railroad Company, purchased by the Louisville, New Orleans and Texas Railway Company, with $800,000 of its said first-mortgage bonds, amounting to a par value of over $34,000,000, with the United States Trust Company of New York *as collateral security for the payment* of its own said issue of $25,000,000.

Paragraphs 12, 13, and 19, Record, pp. 17–19, 25–30.

10th. "That on October 24, 1892, the said Louisville, New Orleans and Texas Railway Company and the original

Yazoo and Mississippi Valley Railroad Company effected a consolidation, whereby the existence of the said Louisville, New Orleans and Texas railway was merged into that of the Yazoo and Mississippi Valley Railroad Company and all of the property, real and personal, and all the rights, privileges and franchises, and immunities of the said Louisville, New Orleans and Texas Railway Company were transferred to and became the property, rights, privileges, franchises, and immunities of the said Yazoo and Mississippi Valley Railroad Company," all "on the faith of the previous adjudications and legislative and constitutional enactments hereinbefore stated;" and the said articles of consolidation are made a part of the paragraph as Exhibit C.

Paragraph 14, Record, pp. 19, 20, 43.

11th. It is then claimed that in the case of Railroad *vs.* Lambert, 70 Mississippi Reports, the State supreme court held that said section 21 was valid and passed in the sale to the Louisville, New Orleans and Texas Railway Company, and in the consolidation to the Yazoo and Mississippi Valley Railroad Company, and that orator, relying on said decision, paid out more of its said issue of $25,000,000 in bonds to pay debts, and for betterments and improvements.

Paragraph 14, Record, pp. 19, 20.

12th. It is then recited that the said State revenue agent, acting under and by virtue of the authority conferred on him by chapter 126 of the Annotated Code of 1892, as amended by the act of 1894, inaugurated and conducted certain suits against orator and said Yazoo and Mississippi Valley Railroad Company for the taxes of 1892, 1893, 1894, and 1895, "*but not including any taxes upon property that had formerly been property of the Natchez, Jackson and Columbus Railroad Company,*" and that the State supreme court expressly overruled the said Mississippi Mills and Lambert cases, "and held that the constitution of 1869 meant that

the property of corporations for pecuniary profit should actually be subjected to taxation," "and did in express terms declare that said section 21 of the Mobile and Northwestern Railroad charter was unconstitutional and null and void *ab initio*," and that *such decision* and action upon the part of the supreme court, when sought to be practically applied, is in conflict with section 10, article 1, and the fourteenth amendment to the Constitution of the United States.

Paragraph 15, Record, pp. 20, 21.

13th. It is then recited that said revenue agent, relying on said decision, applied to said State railroad commission, "*under said law of 1894*," to assess the property in controversy for back taxes for said years 1886–1891, inclusive, and that said railroad commission did proceed to assess the same at a valuation of $5,000 per mile of track for the years 1886–1890, and $9,000 for the year 1891, aggregating as follows: "For the county of Hinds, $——," &c.

Paragraph 16, Record, pp. 21, 22.

14th. Then it is claimed that "the assessments of taxes hereinbefore mentioned, when made as the railroad commission threatens to make the same," are required to be sent down to the counties and towns, and that the *said assessment when made* will constitute a lien "preferential in law to all mortgages and other liabilities, and will cast a cloud upon the title," &c.

Paragraphs 23 and 24, Record, pp. 31, 32.

15th. It is not denied that the property had previously escaped assessment or that the affidavits had not been made and receipts obtained, as required by said twenty-first section, but claims "that the failure to assess was the failure of the State's own officers, whose duty it was to assess the said railroad property for taxation, and for their failure to do so the railroad company was not responsible, nor were

its successors so responsible," and claims that this is all immaterial because the Louisville, New Orleans and Texas Railway Company purchased in 1890 without notice of any claim for the unsatisfied liability of the years 1886–1889, and the consolidated company took the property on October 24, 1892, without any notice of the unsatisfied claim for taxes for the years 1890, 1891, and it is expressly averred that the scheme of said twenty-first section was intended by the legislature to be worked out each year, and affidavits made in each year, &c.

Paragraphs 17 and 18, Record, pp. 22, 25.

16th. Another peculiar claim is set up in the bill. It is as follows: That although the supreme court of Mississippi in the various decisions referred to had denominated the said privilege of section as "exemption from taxation the railroad companies interested in that question have never accepted that view, and your orator does not admit it," but claims that it is "a contract within the meaning of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of a contract," and "which the legislature itself could not repeal, and still less could it be set aside or abrogated by a change of the judicial decisions of this State."

Paragraph 10, Record, pp. 15, 16.

The peculiar efficacy of this twenty-first section is said to be that it "is in the form of an appropriation, made by the legislature out of its public treasury," "the substantial effect thereof being the same as if the taxes had been covered into the treasury of the State, and by the State paid in extinguishment of the railroad's construction liabilities."

Paragraph 4, Record, p. 6.

NOTE.—In laying down this definition the drawer of the bill seems to have overlooked section 5 of said article 12 of

said constitution of December 1, 1869, which provides that—

"SEC. 5. The credit of the State shall not be pledged, or loaned in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association."

See Code of 1880, pp. 35, 36.

17th. And the plaintiff, in order to show there was no *subsequent law* repealing their alleged exemption or appropriation, devotes a paragraph of their bill, which is as follows:

"Your orator shows that under the settled law so construed and acted upon, as aforesaid, the successive legislatures always, including those of 1886, 1888, 1890, 1894 and 1896, as your orator is informed, refused to repeal *exemptions* granted as aforesaid, in charters, and at the last session of the legislature of said State, held during the present year 1898, although the governor in his message urged it to pass a statute repealing an exemption granted in a railroad charter in 1882, and although a bill for that purpose was introduced and urged upon it, yet the legislature steadfastly refused to pass such bill into a law, and defeated said measure so introduced."

Paragraph 6, Record, pp. 9, 10.

18th. Paragraph 22 of the bill sets forth the foregoing decisions, acts, &c., as an *estoppel in pais*.

Record, p. 31.

19th. And paragraph 21 expressly pleads the said Lambert case as *res adjudicata* as against the State and Adams county, and also as against the towns and the other counties, on the ground that "they derive the right to levy taxes alone by delegation from said State."

Record, p. 31.

20th. The prayer of the bill is to enjoin "the said railroad assessors aforesaid, from approving, and the said assessors

and their said clerk, from certifying said assessment for taxes * * * to the several counties * * * or cities and towns," and to enjoin the said Wirt Adams, State revenue agent aforesaid, "from beginning, by himself, his agents, attorneys or solicitors, or advising or inciting any of the counties, or towns, to begin suit for the recovery of any judgment or decree for said taxes, or the enforcement of the alleged lien for taxes for any of the years mentioned in this bill, and from taking any proceeding looking to the subjection of said property * * * to the payment of the taxes so claimed for said years or any of them," and that on the final hearing said injunction be made perpetual, "and that the contract of exemption as shown by the charter of the said Natchez and Jackson Railroad Company and said section twenty-one of the said Mobile and Northwestern charter as applied thereto by the act of 1870, be declared valid and binding both as to the State and counties and municipalities therein for the term of thirty years from the date of said charter," &c.

Record, pp. 33, 34.

The appellee Wirt Adams has made and filed an affidavit here to the effect that after the restraining order was discharged, writ quashed, and injunction refused he brought his bill in equity in the chancery court of Hinds county, Mississippi, against said Illinois Central and Yazoo and Mississippi Valley Railroad Companies, to which said defendants filed their answer, and that such further proceedings were thereupon had that in February, A. D. 1900, a final decree was rendered therein in favor of complainant and against said defendants, establishing a lien on said property for said taxes, and that said decree stands in full force and virtue and is claimed to be *res adjudicata* and to render this appeal unnecessary and abortive.

See affidavit on file.

The court will take notice that in this appeal no supersedeas was applied for or granted.

Record, pp. 133–135.

Points Involved.

From the foregoing statement it will be seen that there are four main points involved:

1st. When an injunction has been refused on a pure injunction bill, and the things have been done that were attempted to be enjoined, and an appeal afterwards taken to this court without supersedeas or in any manner reinstating the restraining order, whether this court should not dismiss the appeal as entirely unnecessary and improper.

2d. Whether this court has any jurisdiction under the first or jurisdiction-alone clause of the fifth section of the judiciary act of March 3, 1891, when the record and first certified question shows that one of the grounds on which the bill was dismissed related to the right of the plaintiff to bring the bill as sole plaintiff.

3d. Whether the second certified question, that the bill set forth no proper Federal question, was not a correct finding.

4th. Whether the third certified question, that it was a suit against the State, was not a correct decision.

BRIEF.

First Point.

The appellant had filed a bill to prevent the State assessing board from completing and approving an assessment on the property for back taxes from 1886 to 1891, inclusive, and to prevent the State revenue agent from bringing suit on the assessment. While a considerable amount of talk is indulged in about the sheriffs and tax collectors seizing the property, yet the bill on its face shows that this was not done in good faith, for the sheriffs and tax collectors are not even made parties.

The question before this court is whether, when the injunction against the assessing board and revenue agent has been refused, and the assessment made and suit brought on it by the revenue agent, and appeal afterwards taken to this court without supersedeas, and the object and purpose of this suit rendered vain and nugatory, and especially when the appellant has been deprived of no substantial right, but has a complete and adequate remedy by a writ of error, if there is any Federal question involved, and it should be decided against them by the State supreme court, whether this court under such circumstances will entertain this appeal, when apparently nothing can be accomplished by it, for if this court should reverse the court below and hold that the injunction should have been granted, the stubborn fact remains that it was not granted, and the suit was properly brought by the revenue agent, and under section 720 of the Revised Statutes he cannot be enjoined from prosecuting it after it is brought, which renders the further prosecution of this suit entirely unnecessary.

The State supreme court in another injunction bill by these same parties, the Illinois Central and Yazoo and Mis-

sissippi Valley Railroad Companies, in exactly the same kind of a case, has held that the railroad commission or assessing board could not be enjoined from making the assessment.

Railroad Companies *vs.* Adams, 73 Miss., 662, 663.

And after the assessment was made they have held that the exclusive remedy was by a certiorari.

See late opinion, No. 9358, Yazoo and Mississippi Valley and Illinois Central Railroad Companies *vs.* Wirt Adams, decided March 27, 1899, copy on file.

And this court has decided that decisions like these raise no Federal question.

North. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.
Yesler *vs.* Washington, &c., 146 U. S., 646, 657.

And if this court should reverse this case those opinions of the State court could be set up and used in this suit as well as in that in the State court, and whether made before or pending this appeal.

Oakes *vs.* Mase, 165 U. S., 363, 364.
Nugent *vs.* Philadelphia, &c., 87 Fed. R., 251.
Union Pac. R. R. Co. *vs.* Baker, 5 Kans. App., 253.

Hence we claim that in any light in which this case can be viewed this appeal is entirely unnecessary and useless.

Dixon *vs.* Greene, 76 Miss., 794.
Mills *vs.* Green, 159 U. S., 651.
See also our briefs on this point in Nos. 318 and 320, pages 15–17 and 11–15.

1st Certified Ground.

This is evidently based on the fourth ground of the motion to discharge the restraining order and refuse the injunction, that "the plaintiff has shown no right to file the bill in this

case under the 94th equity rule, or otherwise," followed by the motion to dismiss the bill on the ground "that the sole object of said original bill was for an injunction as therein shown, which injunction was by this court refused," &c., and which was sustained in the order or decree dismissing the bill.

Record, pp. 89, 128, 133.

It must be borne in mind that whatever rights the Illinois Central Railroad Company has are entirely *derivative*. It has no independent right to sue, for it is plain that any rights it has must be claimed under and through the charter of the Yazoo and Mississippi Valley Railroad Company as consolidated, for this court well say *there can be no irrepealable contract right where there is no irrepealable contract*. It has no standing to enforce anything except the charter rights of the Yazoo and Mississippi Valley Railroad Company, *and for and in place of that company*.

Louisville *vs.* Bank of Louisville, 174 U. S., 444.

There is no proper diversity of citizenship, and it is difficult to find on what theory the Illinois Central Railroad Company filed the bill as sole plaintiff.

1st. It tries to set up some undefined interest as a stockholder, but to this there are three answers:

(*a.*)

If it was a direct stockholder it has shown no ground whatever to file the bill. It has shown no effort whatever to induce the Yazoo and Mississippi Valley Railroad Company to file or that said company had ever been requested or refused to file it, and the Illinois Central Railroad Company could not put forward any such pretense, for it admits that it owns all but four of the shares of the Mississippi

Valley Company, and the Mississippi Valley Company owns a majority of the stock of the Yazoo and Mississippi Valley Railroad Company.

It affirmatively shows that it has a controlling interest in the Yazoo and Mississippi Valley Railroad Company, and hence it has no standing as the plaintiff in a court of equity, and this before and without any regard to the ninety-fourth equity rule, which was only designed to make the general equity rule already prevailing more stringent, and more effectually block these attempts to commit a fraud on the jurisdiction of the Federal courts in just such cases as these.

Hawes *vs.* Oakland, 104 U. S., 450.
Taylor *vs.* Holmes, 127 U. S., 489.
Mount *vs.* Radford, 93 Va., 430, 431.
Decatur *vs.* Palm, 113 Ala., 531.
Warren *vs.* Shoe Co., 166 Mass., 97.
Ware *vs.* Bozeman, 58 Ga., 340.
4 Thompson, Comm. Law Corp., §§ 4476–4480.

The Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company could not litigate against each other, and hence could not properly be placed on the opposite side of the docket, because the one has absolute control of the other.

Mills *vs.* Green, 159 U. S., 653.
Merritt *vs.* Bowdoin College, 169 U. S., 556.
Lake County *vs.* Dudley, 173 U. S., 251–254.
South Springs *vs.* Amador, 145 U. S., 301.
May's U. S. Sup. Ct. Pract., p. 45.

And they are not even attempting it, except theoretically, for the same attorney signs the papers for both in this same litigation, which shows that it is an attempt pure and simple to confer jurisdiction by collusion on account of diversity of citizenship.

Record, pp. 90, 91, 136.

(*b.*)

The stock was in the name of the Mississippi Valley Company, and if the bill could be filed by a stockholder, that stockholder would be the Mississippi Valley Company, and it is not made a party at all, either as plaintiff or defendant, the reason, we suppose, being that it was a MISSISSIPPI CORPORATION, for the Illinois Central Railroad Company, owning all but four shares of its stock, could have made it either the plaintiff or a defendant, as it chose, and the same rule applies, which we have just argued, that a stockholder cannot sue until he has requested the corporation and it has refused, and the Illinois Central could not sue until a request to and refusal by the Mississippi Valley Company.

(*c.*)

The bill shows that this Mississippi Valley Company bought 37,539 shares of the 48,242 shares of stock in the Louisville, New Orleans and Texas Railway Company in the month of April, 1892. This court may ask, Why this circumlocution? Why did not the Illinois Central Railroad Company buy the stock itself outright?

It was because of this little provision in section 197 of the constitution of November 1, 1890:

"SECTION 197. The legislature shall not grant to any foreign corporation or association a license to build, operate, or lease any railroad in this State; but in all such cases where a railroad is to be built or operated, and the same shall be partly in this State and partly in another State or States, the owners or projectors thereof shall first become incorporated under the laws of this State; nor shall any foreign corporation or association lease or operate any railroad in this State or purchase the same or any interest therein. Consolidation of any railroad lines and corporations in this State with others shall be allowed only where the consolidated company shall become a domestic corporation of this State. No

general or special law shall ever be passed for the benefit of any foreign corporation operating a railroad under an existing license from this State, or under an existing lease; and no grant of any right or privilege, and no exemption from any burden, shall be made to any such foreign corporation, except upon the condition that the owners or stockholders thereof shall first organize a corporation in this State under the laws thereof, and shall thereafter operate and manage the same, and the business thereof, under said domestic charter."

The object of this constitutional provision is very evident. It was to give the State control of its own corporations and prevent any discrimination or advantage in favor of foreign corporations, which were not equally available to its own citizens. This constitutional provision simply equalizes the matter and puts all on the same footing. They are all entitled to the protection of the United States Constitution against impairing the obligation of contracts and not being deprived of property without due process of law, and put on the same footing also as to effect of the decisions of the State courts as to the construction of their own laws and constitutions, and we do not think this court would permit the plaintiff to commit a fraud on the laws and constitution of Mississippi by conforming to their letter and violating their spirit.

A man cannot do indirectly that which he cannot do directly. The courts will dig down through the crust to the meat of the matter, and we do not think this court will permit the Illinois Central Railroad Company to use the Mississippi Valley Company to buy the stock in the Louisville, New Orleans and Texas Railway Company, as a domestic corporation, to conform to the constitution of Mississippi and then turn round and sue in the Federal court itself as a non-resident, in direct violation of the spirit, if not the letter, of that constitution.

All that a corporation can reasonably demand or expect

is that the State of Mississippi shall not deny to it the equal protection of the laws with its own citizens, but this court has decided that it is not included in nor entitled to the provisions of article 4, section 2, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," and hence a corporation has no right to violate the constitution and laws of a State and then run into the Federal court and secure advantages not extended by the State to its own citizens.

Blake *vs.* McClung, 172 U. S., 240, 259.

All that it can require is that it shall have the *equal protection* of the laws, and nothing more.

2d.

It is equally difficult to see how the Illinois Central Railroad Company can have any standing as a bondholder or creditor.

In the first place, its claim of an innocent purchaser is absolutely without foundation. In paragraphs 12, 13, and 19 of its bill (see analysis of bill in statement, *ante*, 9th) it purchased the greater part of the bonds and stock in April, 1892, before the Lambert case was decided, and in paragraph 15 (see analysis, *ante*, 12th) it recites that the State revenue agent instituted suits for the taxes of 1892 and 1893 and of 1894 and 1895, resulting in a decision of the Supreme Court finally on June 20, 1898, holding the so-called exemption void, so that they could not have depended on the Lambert case before it was decided, and have had notice not only by *lis pendens*, but by actual notice since.

This in passing, but the point we make here is that as a creditor they have no standing in a court of equity until they have reduced their claims to judgment, either under the rules of general equity practice or of this court or of

the State court, which only allows creditors at large to resort to equity in the first instance in case of fraudulent conveyances, and has no application to tax suits.

Van Weel *vs.* Winston, 115 U. S., 245, 246.
Cates *vs.* Allen, 149 U. S., 451.
May's U. S. Sup. Ct. Prac., p. 552.
Miss. Code 1892, § 503.

Their claim to sue as a bondholder is equally unfounded.

The bill shows that they only own $13,805,000 of the $16,900,000 of first-mortgage, $8,731,000 of the $10,000,000 of second-mortgage, and $8,347,000 of the $10,000,000 of income or land-grant bonds, thereby affirmatively showing that they do not own all of either set of bonds.

The rule in such cases is that before they are authorized to institute or prosecute suits for the safety or security of the trust estate they must first request the trustee of the mortgage and show a refusal by him.

Coal Co. *vs.* Blatchford, 11 Wall., 172, 177.
Stevens *vs.* Eldridge, 4 Cliff., 348.
Morgan *vs.* Kans. Pac. R. R. Co., 15 Fed. R., 56, 57.
Owens *vs.* Ohio, &c., R. R. Co., 20 Fed. R., 12, 13.
Barry *vs.* Mo., Kans. & Tex. R. R. Co., 27 Fed. R., 1, 2.
Ritchter *vs.* Jerome, 123 U. S., 246, 248.
Van Weel *vs.* Winston, 115 U. S., 245.
City of Atlanta *vs.* Grant, 67 Ga., 340.
5 Thompson, Comm. Law Corp., §§ 6126, 6209, 6210.
(4 ed.) 2 Perry on Trusts, § 885 and § 886, citing—
Reade *vs.* Sparkes, 1 Moll., 8.
Hughes *vs.* Key, 20 Beav., 395.

And if the trustee refuses to sue, it is absolutely essential that he be made a party defendant, and that the bondholders who do sue should sue on behalf of themselves *and all the other bondholders*, for the suit is to establish a general right common to all, and cannot be maintained by a single

bondholder. It must be in behalf of all to establish the general right, and the trustee must be a defendant so as to bind all and prevent a multiplicity of suits, which is the sole ground of equity jurisdiction to entertain a suit by one of a numerous party.

Wood *vs.* Draper, 24 Barb., 187.
Williams *vs.* County Court, 26 W. Va., 488.
Packard *vs.* Bd. County Com., 2 Colo., 338.
(3d ed.) 2 High on Inj., § 1560.
Winslow *vs.* Minn., &c., R. R. Co., 4 Minn., 316.
Barry *vs.* Mo., Kans. & Tex. R. R. Co., 27 Fed. R., 1, 2.
Morgan *vs.* Kans. Pac. R. R. Co., 15 Fed. R., 56, 57.
Carey *vs.* Brown, 92 U. S., 171, 172.

3d.

Another reason why the court as a Federal court had no jurisdiction is that paragraph 16 of the bill (Record, pages 21, 22) shows that the aggregate amount of taxes would be more than $50,000 for the twelve years; but there are the amounts of privilege taxes and of ad valorem taxes due the State *in each county*, and the amounts *due to each* of the five counties, and the amounts due to each of the nine towns, and there is nothing to show what would be due to each. The account is stated in blank, thus:

1. For the county of Hinds..... .... $
2. For the county of Copiah ..... $

&c., &c.

It does not show that as much as $2,000 would be due in any single instance, and it is certain that so much would not be due in many.

This court holds that so far as the jurisdiction of the Federal courts in suits to enjoin the collection of taxes is con-

cerned, the amounts due each must be treated as several, and the bill must show affirmatively the several amounts.

Citizens' Bank *vs.* Cannon, 164 U. S., 321, 322.
Fishback *vs.* West. Un. Tel. Co., 161 U. S., 99–101.
N. Pac. R. R. Co. *vs.* Walker, 148 U. S., 391, 392.
Walter *vs.* N. E. R. R. Co., 147 U. S., 371–374.
Washington *vs.* Dist. of Col., 146 U. S., 231, 232.
Holt *vs.* Indiana Mfg. Co., 176 U. S., 72, 73.

As said in the statement, *ante*, we call attention to this not as a technical and amendable defect merely, which, however, was never amended, but also to show that until the assessment was completed and approved the plaintiff could not tell what the taxes would amount to, and hence was forced to leave these blanks, and this court has no jurisdiction and the circuit court had no jurisdiction, not only because it is not shown what the different amounts of taxes were, but also because at that stage of the proceedings it could not be shown, and the decision of the State supreme court in Yazoo and Mississippi Valley R. R. Co. *vs.* Wirt Adams, 73 Miss., 648, 662–663, enunciated a sound principle of law, that the making of an assessment like this one could not be enjoined, and this court has expressly held that a decision like that presented no Federal question.

N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

In order to justify an appeal to this court on the question of the jurisdiction of the court below, it is necessary that that should be the CONTROLLING question, for if there are other questions on which the action of the court below can be sustained, then the decision on that question would amount to nothing. It was plainly the intention of this provision that an appeal could only be taken in cases where the decision of this court would either affirm or reverse the

decree of the court below, and not merely some of the grounds or reasons on which it was founded.

Carey *vs.* Houston, 150 U. S., 170, 181.

The jurisdiction meant is the jurisdiction *as a Federal court*, and not on grounds common to all equity courts.

Blythe *vs.* Hinckley, 173 U. S., 501.

Smith *vs.* McKay, 161 U. S., 357, 358.

And the question as to who is the proper party to bring the suit is not a Federal question, even though the merits of the suit itself may involve Federal questions, and this appeal should be dismissed.

Montgomery *vs.* Hernandez, 12 Wheat., 129.

Merritt *vs.* Bowdoin College, 169 U. S., 551, 556.

2d Certified Ground.

That No Federal Question Was Involved.

It is plain from the statement of the case *ante* that this case involves no Federal question.

In the twenty-first paragraph of the bill the Lambert case is pleaded as *res adjudicata*, but whether it is or not, or whether one judgment is *res adjudicata* in a subsequent suit, depends either on general principles of law or on the local practice and in neither case raises any Federal question.

Chouteau *vs.* Gibson, 111 U. S., 200, 201.

Phœnix Ins. Co. *vs.* Tenn., 161 U. S., 184–186.

In re Woods, 143 U. S., 202, 206.

N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

California *vs.* Holliday, 159 U. S., 415–417.

Hagar *vs.* California, 154 U. S., 639.

Wheeling *vs.* Wheeling, 138 U. S., 287.

San Francisco *vs.* Itsell, 133 U. S., 65.

Newport *vs.* Newport, 151 U. S., 527, 528.

Telluride *vs.* Rio Grande, 175 U. S., 639, 646, 647.

In the twenty-second paragraph the bill pleads the former decisions of the State court and acts of the State officers as *stare decisis*, a rule of property, and constituting an estoppel on the State. This has been frequently and expressly decided by this court to raise no Federal question. The doctrine of laches and estoppel have no application to a State.

Pierce *vs.* Somerset Railway, 171 U. S., 648–650.
United States *vs.* Kirkpatrick, 9 Wheat., 720.
Hansford *vs.* Davis, 163 U. S., 278.
Central Land Co. *vs.* Laidley, 159 U. S., 109–112.
United States *vs.* Tanner, 147 U. S., 663.
Vicksburg, &c., *vs.* Dennis, 116 U. S., 665.
Yazoo, &c., *vs.* Thomas, 132 U. S., 185.
State *vs.* Brewer, 64 Ala., 287.
Perry Co. *vs.* Selma, 65 Ala., 391.
Hannibal *vs.* City of Kansas, 81 Mo., 285, and cases cited.
Delaware, &c., *vs.* Commonwealth, 50 Pa. St., 399.
Wood *vs.* Brady, 150 U. S., 20–23.
Opinion of Mississippi supreme court in No. 244, pp. 664–671.

And this is all there is of it. The sixth and ninth paragraphs of the bill expressly state and claim that the legislature has never repealed this so-called exemption or appropriation.

Record, pp. 9, 10, 12–14.

So there is no subsequent law complained of, and so also it is immaterial, so far as this case is concerned, whether said twenty-first section is an irrepealable exemption on the face of it, and for that reason forbidden both by sections 13 and 20 of article 12 of the constitution of 1869 and the language of the Mississippi Mills case in 56 Miss. R., pp. 53 and 62, as held by the supreme court in said opinion of

November 22, 1898, and on said pages 53 and 62 themselves, the court saying on the latter page that "if the exemption is granted in the form of a contract in a charter, that is prohibited," or whether it is really an irrepealable appropriation of taxes, "the substantial effect thereof being the same as if the taxes had been covered into the treasury of the State, and by the State paid in extinguishment of the railroad's construction liabilities," as contended for in the fourth paragraph of the bill, and therefore forbidden by section 5 of article 12 of said constitution of December 1, 1869, which forbids the State to pledge or loan its credit to any corporation, in neither view is there any subsequent law or any Federal question. Mere assertion does not satisfy this court. If it did every case in the land could be brought here. There must be some *bona fide* color of a Federal question.

We call the attention of the court to the opinion or summary of holdings of the Mississippi supreme court on June 20, 1898, holding these railroad exemptions unconstitutional, and also to the full opinion on that subject on November 22, 1898. They are in the record in No. 244, pages 513–515, and 659–671. Together they constitute a full and exhaustive review of that phase of the case.

And we beg of this court not to overlook the fact that the bill in this case was filed on AUGUST *5, 1898*, and that the State supreme court did not decide that exemptions were *repealed* till said full opinion of *November 22, 1898*.

See Record in No. 244, pp. 671–673.

So at the time the bill was written and filed there was no reason to state that the exemption had been attempted to be repealed, and it was not so stated, but, on the contrary, that it had not been repealed, and hence there could be no Federal question, as this court has often decided that the decision of the State court overruling its former decisions or deciding on the original invalidity of an exemption, in the absence of a subsequent law, raises no Federal question.

See also our Brief in No. 318, pp. 27–37.

3d Certified Ground.

But if this court should for any reason take jurisdiction, then we insist that the decree of the court below should be at once affirmed on either or both the last two grounds certified.

The third is that it is a suit against the State, which is the first ground of the motion to refuse the injunction, and hence included in the motion to dismiss the bill.

The order of the railroad commission or State railroad assessors, which was introduced in evidence, as shown by the judge's notes, shows that the said railroad assessors made a provisional assessment on August 2, 1898, "and on demand of said Yazoo and Mississippi Valley Railroad Company, by its attorney, it is ordered that said assessments so made remain on file for thirty days for the filing of objections thereto."

Record, pp. 90, 95.

And the twenty-third paragraph of the bill says that the assessment "*when made*" will be sent to the counties and towns, and the twenty-fourth paragraph says that said assessment "*when made*" will constitute a lien, &c.

Record, pp. 31, 32.

And the prayer of the bill is to enjoin the said railroad assessors "*from approving*," &c., and said revenue agent from suing for the recovery of any judgment or decree for said taxes.

Record, pp. 33, 34.

It is plain that, conceding the said twenty-first section to be valid, there are several questions of fact to be determined, among others:

1st. Was the railroad able to declare and pay the 8 per cent. dividend?

2d. Did it appropriate the taxes to the construction debts?

3d. Did it make the affidavits required by the charter?

4th. Did it file those affidavits with the tax collectors and get their receipts?

5th. Was the purchase of the $1,250,000 of bonds by the Louisville, New Orleans and Texas Railway Company with $800,000 of its own 4 per cent. bonds, as related in paragraph 7 of the bill, a novation of the debt, seeing that no interest was thereafter paid on the Natchez, Jackson and Columbus bonds, but only on this $800,000 of Louisville, New Orleans and Texas Railway bonds?

And yet it is proposed by the bill to take all these questions of fact and all other questions, either of law or fact, away from the regular assessing tribunal and try them in a court of chancery.

The State supreme court has decided that this cannot be done.

> Yazoo & Miss. Val. R. R. Co. *vs.* Adams, 73 Miss., 662, 663.

And this raises no Federal question and is decisive of this appeal and this case.

> N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

Later that court decides that the railroad assessors in deciding these questions act JUDICIALLY, and that the statutory remedy by certiorari is exclusive, and refer to decisions of this court to the same effect. (See opinion in No. 9358, Yazoo & Miss. Val. R. R. Co. *et al. vs.* Wirt Adams, decided March 27, 1899, and not yet reported, on file in this case and in No. 318.)

As this court has decided that it cannot review a finding of facts by the State tribunal or its interpretation of local law, it would necessarily follow that it has no power to enjoin the State court *from finding the facts or interpreting the local law.*

Keokuk Bridge Co. *vs.* Illinois, 175 U. S., 631, 632.
Telluride *vs.* Rio Grande, 175 U. S., 639, 643–647.
Egan *vs.* Hart, 165 U. S., 188.

At all events, the revenue agent was improperly joined, and a chancery court will not undertake to conduct a suit with or against improper parties. The revenue agent from the outset insisted and still insists that the suit against him is a suit against the State, and, as the plaintiff did not see proper to dismiss as to him, the injunction was properly refused, and, no leave still being asked to amend, there was no other recourse but to dismiss the bill.

(3d ed.) 2 High on Inj., § 1613, citing—
Hudson *vs.* Maddison, 12 Sim., 416.
Jones *vs.* Garcia, &c., Turn. & R., 297.

The statute requires the revenue agent to sue in his own name, but for the use of the State, county, and town interested, and he is not to be liable for costs, and may sue either at law or in equity in any case where the State or the county or town could sue.

Annotated Code of 1892, § 4194.
Laws of 1894, p. 29, § 2.

In a similar case this court say that "a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract by forbidding all those acts and doings which constitute a breach of the contract, must also necessarily be a suit against the State. In such case, though the State be not nominally a party to the record, if the defendants are its officers and agents through whom

alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State."

In re Ayers, 123 U. S., 502, 503.

This is exactly what is attempted here, namely, to prevent the regularly organized tribunal, acting in a judicial capacity, from passing on the defenses set up by the State to the claim of exemption, and even to prevent the State, through its regular representative, from suing in the ordinary courts of the country.

This court say "it is not to be assumed in advance that Federal questions will arise, or that if they do arise, that they will be erroneously decided;" and if they are erroneously decided it can be corrected by this court on a writ of error.

In re Ayers, 123 U. S., 494, 495.

And they point out clearly the distinction between suits against the State and suits against its officers acting in a *ministerial capacity* and attempting to justify under an unconstitutional law.

Ib., pp. 506, 507.

This decision is approved in—

Hans *vs.* Louisiana, 134 U. S., 10.

And distinguished in—

In re Tyler, 149 U. S., 165, 166, 190, 191.

And is quoted in another case, where it is said the test is whether the State would be bound. It clearly would be in this case, for the final prayer of the bill is to decree the property to be perpetually exempt for the years named, and also to decree it to be a contract "valid and binding both as to the State and counties and towns therein for the term

of thirty years from the date of the said charter." It expressly asks the State to be bound.

Tindall *vs.* Wesley, 167 U. S., 219, 220, 223, 224.

This court can very well see that the claim in the twenty-third paragraph of the bill (Record, pp. 31, 32) that if the railroad commission and their clerk, *when the assessment is made*, are permitted to send the same down to the counties and towns, the tax collectors are required to collect the taxes by seizure of the property, and that hence orator is threatened with a multiplicity of seizures and suits, is not made in good faith, for the very next sentence (Record, p. 32) says that the revenue agent "threatens, in his legal capacity as the representative under the law of the State of Mississippi and of said counties and towns, to bring a suit for the recovery of the taxes so assessed," and paragraph 15 shows that the revenue agent did bring other suits, and the cases in this court just preceding and succeeding this, Nos. 318 and 320, in this court, tried at the same time, show that the revenue agent has brought the suits, and there is no foundation for the intimation that probably, under some circumstances, the tax collectors may seize the property.

The above allegation that the revenue agent, in his legal capacity, threatens to bring a suit is the gist of the whole thing, and shows plainly that this is an unmitigated attempt to sue the State and establish this as a contract against the State, and notwithstanding and against any defenses it may have, and is in violation of the eleventh amendment to the Constitution of the United States.

The principle in the *In re* Ayers case is approved and applied in the cases of Fitts *vs.* McGhee, 172 U. S., 524–528; Harkrader *vs.* Wadley, 172 U. S., 169, 170; Hagood *vs.* Southern, 117 U. S., 52.

Besides, on general principles a tax collector cannot be enjoined from bringing a suit for taxes in the ordinary courts of the country. It is unprecedented.

Archer *vs.* Terre Haute, &c., 102 Ills., 493.

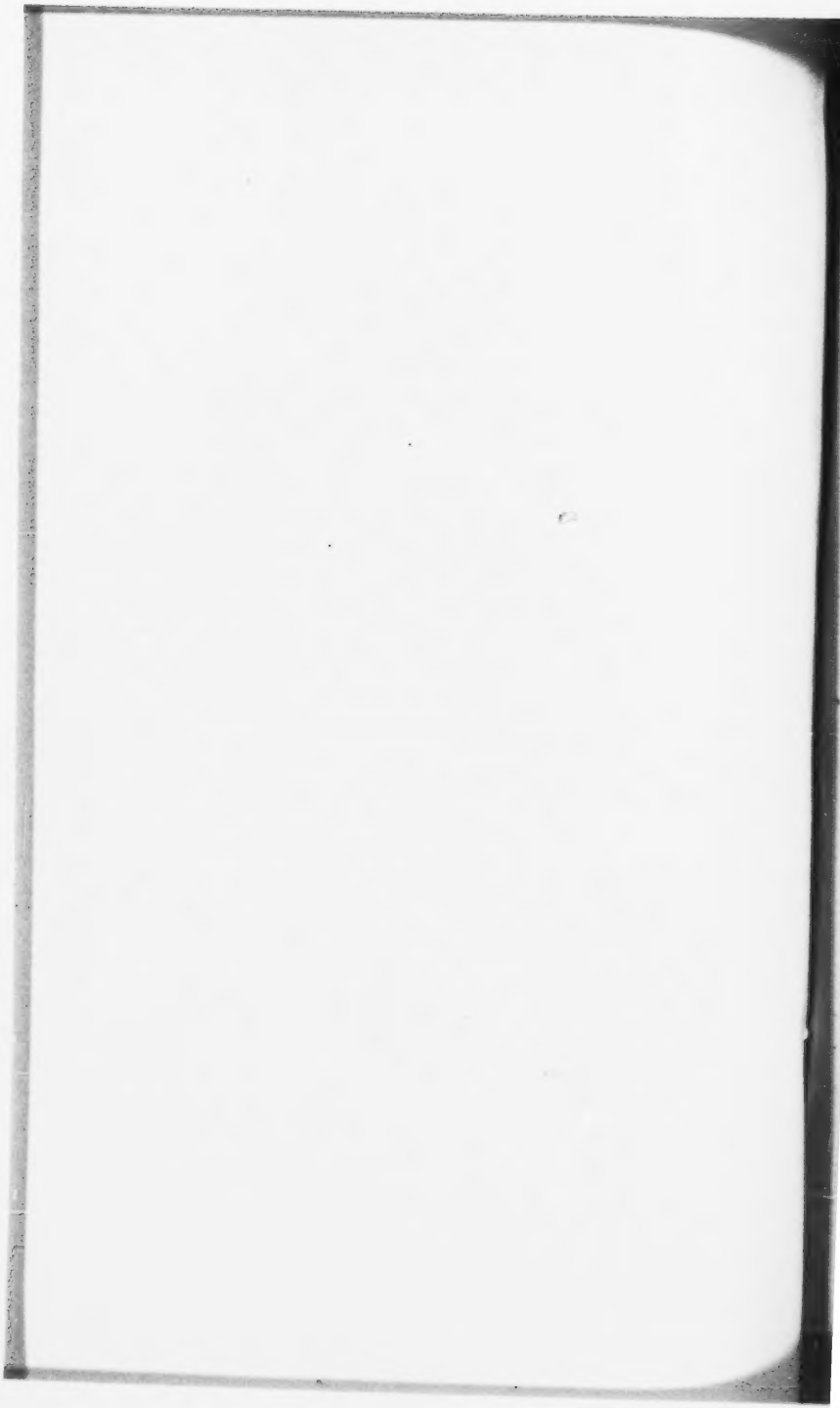
This case was tried at the same time and together with the preceding case, No. 318, and the succeeding case, No. 320, and for further discussion, if the court is not satisfied with this, we refer to the briefs in those cases, and for a full discussion we refer to the brief of associate counsel.

We ask the court to dismiss the appeal, or, if that cannot be done, to affirm the decree.

F. A. Critz,

R. C. Beckett,

Of Counsel for Appellees.



Office Supreme Court U.S.
FILED
OCT 11 1900
JAMES H. McKENNEY, Clerk.

No. 78.

Add'l. Brf. of Green for Appellees

IN THE

Supreme Court of the United States

Filed Oct. 11, 1900.

No. 78 October Term, 1900.

No. 319 October Term, 1899.

The Illinois Central Railroad Company,
APPELLANT.

vs.

Wirt Adams, State Revenue Agent, and the Railroad Commission of the State of Mississippi, et al., Appellees.

Additional Brief in Support of Motion to Dismiss or Affirm.

MARCELLUS GREEN,
GARNER WYNN GREEN,
Of Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs. { No. 319 October Term, 1899.
{ No. 78 October Term, A. D. 1900.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Additional Brief on Motion to Dismiss or Affirm for Appellees.

Errors in Statement of Case by Appellant.

In the statement of the case in the brief for appellant numerous errors occur:

1. On page 3 it is stated that the bill was filed "for the purpose of restraining the enforcement of the taxes for the years 1886 to 1891 inclusive, alleged to be imposed in violation of the contract clause of the Federal Constitution and of the Fourteenth Amendment (id. p. 21.)" This is erroneous in this: The bill was filed to restrain the Railroad Commission from *approving* and *certifying* the assessment of the taxes; and the Revenue Agent from bringing suit to enforce them when assessed. There is no averment in the bill that the "taxes" had been "imposed." On the contrary

the very object of the bill was to prevent their imposition. There is no averment that there was any statute violative of the Federal Constitution, under which the taxes were being imposed. The objection was that the Railroad Comsion, as State Railroad Assessors, was about to give effect to the *decision* of the State Supreme Court, in No. (244) 35, in making the assessment; and that the State Revenue Agent was about to bring suit for the enforcement of the assessment, and that such judicial proceedings would be violative of the Federal Constitution.

2. While the averments as to the decision of Mississippi Mills vs Cook, as stated on page 4, do occur, the bill does not count on the rule of exemption therein stated; but, on R. p. 15, states that said 21st Section is not an exemption and that it has never been treated as such; but that it is a contract of appropriation of the taxes which has never been within the prohibition of Sec. 13, Art. XII of the Constitution of 1869, and that now, for the first time, it is necessar toy have it defined.

3. On page 12 of said brief it is stated that the bill shows "the attempted impairment of these contracts by subsequent legislation of the State". This is erroneous. The bill does not aver that there had been any subsequent statute passed impairing the obligation of these contracts. It expressly avers that there had been no repeal of the exemption (R. p. 14); the matter complained of as violative of the Federal Constitution was the decision of June 20, 1898, in No. 244, in being applied and given effect by the proceedings to make and enforce the assessment. (R. 9, 10, 13, 20).

The Subsequent Suit in the State Court.

The suit for the taxes sought to be enjoined has passed into judgment in the State ~~Circuit~~ Court.

Appellant cites *Huntingdon v. Laidley*, 177 U. S. 668, as authority on this motion to dismiss. Here a restraining order was granted on the bill, and an injunction was moved for, and the Court, after hearing the evidence, discharged the restraining order and refused to grant the injunction. The only relief sought by the bill was the injunction of the proceedings to make and enforce the assessment. Its mission was to prevent the assessment being made, and the suit thereon being brought. When the assessment had been made and the suit had been brought and the judgment

rendered thereon, the bill to obtain the injunction became *functus officio*. No such question arose or was decided in *Huntingdon v. Laidley*.

Where no relief can be granted because of an event happening after the appeal, the proper course is to dismiss the appeal, (*Kimball v. Kimball*, 174 U. S. 163) "for the reason that its decision could not be made effectual by a judgment."

II

Jurisdiction of This Court.

Appellant relies upon *Shields v. Coleman*, 157 U. S. 176, and *Calvin v. Jacksonville*, 158 U. S. 458. In *Shields v. Coleman* the certificate expressly showed that the question of the jurisdiction of the Court was the sole and unmistakable question certified. The question was whether the jurisdiction of the Federal Court extended to the dispossession of a Receiver of the State Court, and the Court *a quo* had maintained the jurisdiction. This Court there says: "The record must affirmatively show that the trial Court sends up for consideration a single, definite question of jurisdiction," p. 177. In *Calvin v. Jacksonville*, supra, the clearly defined question was that of the jurisdictional amount—a condition precedent to the existence of jurisdiction. *In re Lehigh Min. & Man. Co.*, 156 U. S. 322, and *Interior Construction Co. v. Gibney*, 160 U. S. 219, and *Smith v. McKay*, 161 U. S. 357, are cited by appellant in No. 318, on this point. The first two cases arose on a plea to the jurisdiction, and, hence, the record itself made the certificate. In *Smith v. McKay*, the petition averred that the Court had held that it had jurisdiction; and ,hence, the jurisdiction of the Court as a Federal Court was necessarily affirmed. There was a motion to dismiss for want of jurisdiction in the Court below because the remedy at law was adequate. This Court dismissed the appeal because want of equity was not want of jurisdiction as a Federal Court. This is the very proposition insisted on by appellee here. In *Kirwan v. Murphy*, 170 U. S. 205-9, a temporary injunction had been *granted* and an appeal taken to the Circuit Court of Appeals, and the decree was there affirmed, and then an appeal was taken to this Court from the Circuit Court of Appeals; and it was held that as the decree appealed from was interlocutory no appeal would lie; but it seems that *certiorari* was the proper remedy. There the Circuit Court of Appeals did not decide whether the temporary injunction should be

made perpetual or not; but in the case at bar, when the Circuit Court discharged the restraining order and refused the injunction, after hearing the evidence, and an appeal from that decree was taken to the Circuit Court of Appeals, and that Court dismissed the appeal, a final decree was rendered by the Circuit Court of Appeals so far as that Court was concerned, whereby it refused to reverse the decree of the Circuit Court and left it in full force. The Circuit Court had, with the whole case before it, and upon a bill for an injunction, solely, discharged the restraining order and refused the injunction. That action was essentially final so far as the Circuit Court was concerned, and the Court of Appeals did not change this result, but by dismissing the appeal left that decree in full force. Such a decree was final *quoad hoc*, and from it an appeal would lie. (2 Ency. Pl. and Pr. p. 124.) *Kirwan v. Murphy*, supra, recites *Smith v. Vulcan Iron Works*, 165 U. S. 518, as holding that in a patent suit on appeal from an interlocutory decree granting an injunction and ordering an accounting the Court of Appeals might consider and decide the merits, and render or direct a final decree dismissing the bill, "and this course might be pursued in other cases, *Mills v. Green*, 159 U. S. 651." From such a decree in the Court of Appeals an appeal would lie to this Court by *certiorari*. So in the case at bar. The interlocutory degree in the Circuit Court, covering the whole case and refusing the only relief prayed, upon appeal to the Court of Appeals, was subject to its jurisdiction to decide the whole case; and to its power of certification of constitutional questions to this Court if it elected so to do; and when, with this full jurisdiction of the appeal, it erroneously, of its own motion, dismissed the appeal, the remedy of appellant was by *certiorari* from this Court to the Court of Appeals (*Am. Construction Co. v. Jacksonville R. R. Co.* 148 U. S. 384.) There exists no power in this Court now, on this appeal from the Circuit Court, to modify the decree of the Court of Appeals, whereby, in legal effect, was left adjudged every question of record within its jurisdiction. The reversal hereof the decree of the Circuit Court in its findings on Constitutional questions would be *brutum fulmen* as long as the questions of general equity jurisprudence and of the interpretation of the validity of the State statutes under the State Constitution decided by the Circuit Court remain unreversed by the Court of Appeals, or by this Court on an appeal from the decree of the Court of Appeals. In *Holt v. Indiana Mfg. Co.* 176 U. S. 68, there was a bill to restrain the collection of taxes on patent

rights upon the ground that patent rights were non-taxable by State laws, and that the statutes imposing the taxes violated the Federal Constitution. The Circuit Court maintained the jurisdiction and granted the relief as prayed; an appeal was taken to the Court of Appeals, and that Court held that the suit was not one arising under the patent laws, and that, as the jurisdiction could rest only on the ground that the State statutes violated the Federal Constitution an appeal did not lie to the Court of Appeals, and the appeal was dismissed; an appeal was then taken to this Court under Sec. 5 of the Act of March 3, 1891. This Court dismissed the appeal for want of jurisdictional amount in the Circuit Court. That case did not involve the question here. It did not involve jurisdiction in the Court of Appeals of the whole case. Only constitutional questions were involved. If, as decided, the Court of Appeals had no jurisdiction of the case, the appeal to that Court was merely abortive. In *Carter* v. *Roberts*, 177 U. S. 500, there was an appeal from the Circuit Court in a *habeas corpus* proceeding to the Circut Court of Appeals. The judgment was affirmed, and an application for a writ of error from this Court to the Court of Appeals was denied. An appeal was then taken directly from the Circuit Court to this Court upon the theory that the case involved the construction of the Constitution, and this Court held that whether an appeal should have been taken in the first instance from the Circuit Court to this court or not, that that appeal was not maintainable because the judiciary act of March 3, 1891 does not give the defeated party the right to have his case finally determined by both this Court and the Court of Appeals "on independent appeals," and that this Court could not entertain a direct appeal while the decree of the Court of Appeals was in force. The Court summarizes thus: "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this Court, and if such cases are carried to the Circuit Court of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the Constitutional questions and afterwards proceed to judgment, or may decide the whole case in the first instance." The Act of March 3, 1891, does not contemplate, several separate appeals or writs of error, on the merits, in the same case (*Columbus Construction Co.* v. *Crane Co.*, 174 U. S. 600; *Cin. Ham. & R. R. Co.* v. *Thieband*, 177 U. S. 619.)

In *Huntingdon* v. *Laidley*, 177 U. S. 668, the Act of March 3, 1875, defining the jurisdiction of Federal Courts was construed by the Circuit Court adversely to the jurisdiction, and in such case the jurisdiction of the Court as a Federal Court was directly in issue. Jurisdiction was denied there because of the Federal statute. Regardless of the equity of the trust sought to be enforced the Court below found a denial of jurisdiction in the Act of Congress.

Certiorari to Court of Appeals was the proper remedy of appellant.

Am. Construction Co. v. *Jacksonville Ry. Co.*, 148 U. S. 384.

The Remedy to Restrain.

The remedy to restrain collection of taxes in Federal Courts was held not to exist where the tax was unconstitutional, and the failure to pay it operated as a forfeiture, and would produce a multiplicity of suits, where the remedy of payment under protest and suit to recover back existed (*Arkansas Building & Loan Association* v. *Madder*, 175 U. S. 272). In Mississippi a tax paid under compulsion may be recovered back. (*Tuttle* v. *Everett*, 51 Miss. 27; *Vicksburg* v. *Butler*, 56 Miss. 72; *Winona* v. *Bank*, 69 Miss. 663.) In *U. S.* v. *Parkhurst-Davis Co.* 176 U. S. 320, it is declared: "In the first place, the great object of the suit is to enjoin and stop litigation in the State Courts and to bring all of the litigated questions before the Circuit Court. This is one of the things the Federal Courts are expressly prohibited from doing. By the Act of March 3, 1793, it is expressly declared that a writ of injunction shall not be granted to stay proceedings in a State Court."

Validity of Retroactive Assessment.

Weyerhaueser v. *Minnesota*, 176 U. S. 550, reaffirms *Winona* v. *Minn.*, 159 U. S. 526, and holds that a proceeding, under a subsequent statute, to assess property, escaped taxation for former years, as against a subsequent purchaser where notice was provided for, was valid, and to the equitable defense of a *bona fide* purchase the Court says: "If the plaintiffs had been attentive to the assessment of the land its gross undervaluation could not have escaped their notice. Whether a party in a case has been refused the benefit of estoppel involves no Federal question," p. 559.

If in *Weyerhaueser* v. *Minn.* an actual assessment can be defeated under a subsequently enacted statute for gross

undervaluation the same principle would sustain subsequent revenue acts to subject property escaped taxation upon notice and full opportunity to be heard. This case is conclusive of the case at bar.

Since this case has been pending the Supreme Court of the State has upheld the contention of our brief (p. 74) that the Act of 1884 did not re-enact the exemption of the Natchez, Jackson & Columbus R. R. Co., and that the Lambert case erroneously held that it had restored it. (*Rec. Yazoo and Mississippi Valley R. R. Co.* v. *Adams*, No. 356, October Term, 1900, p. 209.)

In *L. & N. R. R. Co.* v. *Palmes*, 109 U. S. 244, there was a writ of error to the State Supreme Court declaring the invalidity of an exemption from taxation under the Constitution of Florida, in substance like Section 13, Art. 12, Constitution of 1869, and it was contended that there had been a decision prior to the purchase by plaintiffs affirming the validity of the exemption and that upon the faith of this decision the purchase was made; this Court affirmed the last judgment and held that it was not bound by the first decision; and, especially not, because the first decision had not considered or adjudged the questions arising under the State Constitution decided by the later decision. This case is peculiarily applicable to the decision in No. 244 as applied to the Lambert case, and in the rule that should govern this Court in determining the effect of the Lambert case on the case at bar.

III

Suit Against the State.

That this is a suit against the State is conclusively shown by *Smith, Receiver*, v. *Reeves, Treasurer of California*, Mss. op. decided May 14, 1900.

For these reasons and those set forth in the original brief of Messrs Calhoon and Green and Critz and Beckett this appeal should be dismissed, or if color of jurisdiction appears then the decree should be affirmed.

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